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In The
Supreme Court of the United States
October Term, 1987

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H-CHH ASSOCIATES, a California limited
partnership, doing business as **PLAZA**
PASADENA, and **HAHN PROPERTY MANAGEMENT**
CORPORATION, a California corporation,

Petitioners,

v.

CITIZENS FOR REPRESENTATIVE
GOVERNMENT, an unincorporated association,
doing business as **PASADENA CITIZENS**
FOR REPRESENTATIVE GOVERNMENT,

DALE L. GRONEMEIER,
CHRISTOPHER A. SUTTON,
and **OZRO ANDERSON**,

Respondents.

—0—
On Writ of Certiorari to the California
Court of Appeal, Second Appellate District

—0—
MOTION OF PACIFIC LEGAL FOUNDATION
FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF PETITIONERS
AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS	1
BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS	5
INTEREST OF AMICUS	5
DECISION BELOW	6
SUMMARY OF ARGUMENT	6
ARGUMENT:	
I. BY EQUATING A PRIVATE PROPERTY OWNER WITH A GOVERNMENTAL ENTI- TY, THE CALIFORNIA COURT VIOLATES THE PROPERTY OWNER'S FIRST AMEND- MENT RIGHTS	7
II. PREVENTING THE PROPERTY OWNER FROM IMPOSING REASONABLE RESTRI- CIONS ON FREE SPEECH ACTIVITIES IS A TAKING OF HIS RIGHT TO EXCLUDE WITHOUT JUST COMPENSATION	10
CONCLUSION	12

TABLE OF AUTHORITIES CITED

CASES	Page
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	8, 10
Kaiser Aetna v. United States, 444 U.S. 164 (1979)	11
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)	11
Nollan v. California Coastal Commission, — U.S. —, 97 L. Ed. 2d 677 (1987)	11
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)	3, 7, 8
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)	2, 3, 6, 9, 11
Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854 (1979)	9
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)	10

RULES

Supreme Court Rule 36	2
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**MOTION OF PACIFIC LEGAL FOUNDATION
FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF PETITIONERS**

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully moves the Court for leave to file the annexed brief in support of the petition for writ of certiorari. Counsel for petitioners has consented to the filing of this brief and notice of such consent has been lodged with the clerk of the Court. Counsel for respondents has refused consent, and notice of such refusal also has been lodged with the clerk of the Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt public interest organization with over 19,000 contributors and supporters located throughout the country. PLF's principal office is located in Sacramento, California. PLF also maintains a litigation office in Anchorage, Alaska, and a liaison office in Seattle, Washington. Since its establishment in 1973, PLF has actively engaged in research and litigation concerning a broad spectrum of public interest issues. PLF advocates, in policy and practice, the protection of persons' constitutional rights, including property rights, against excessive or illegal intrusion.

The issue in this case is whether California can force a private shopping center owner to allow all political or ideological advocates to use the owner's private property to circulate leaflets or gather petition signatures while preventing the owner from imposing reasonable regulations on the activity. Amicus submits that to do so would violate the owner's First, Fifth, and Fourteenth Amendment rights under the United States Constitution.

In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court accepted the California Supreme Court's

interpretation of the California Constitution to guarantee the affirmative right to intrude on the purely private property of a shopping mall in order to exercise free speech. This Court and the California Supreme Court, however, allowed the ideologues' desires to displace the property owner's rights on the condition that the property owner could protect his or her interests by imposing reasonable regulations on such use of the private property.

The opinion in the case at bar drastically extends *Pruneyard* by eviscerating the property owner's ability to impose reasonable regulations on the use of his or her property by persons who are not there to shop but to espouse their own ideological agenda. The court now requires the regulations to meet the "compelling interest" and "content-neutral, least restrictive means" test (193 Cal. App. 3d 1193, 1207-09, 238 Cal. Rptr. 841 (1987)) normally reserved for measuring the constitutionality of *state* action when restricting speech in quintessential public forums. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). This unwarranted expansion of *Pruneyard* goes far beyond merely interpreting California's free speech clause more broadly than that of the United States Constitution; it strikes the fatal blow to the private property owner's own First, Fifth, and Fourteenth Amendment rights under the United States Constitution.

This decision significantly affects not only all citizens of the State of California, a number of whom are PLF contributors and supporters, but it may serve as a guide to other state jurisdictions. PLF respectfully requests this Court to grant this motion for leave to file the annexed

amicus curiae brief in support of the petition for writ of certiorari.

DATED: February —, 1988.

Respectfully submitted,

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
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INTEREST OF AMICUS

The interest of amicus is set out in the preceding
motion for leave to file this brief.

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DECISION BELOW

The opinion of the California Court of Appeal, Second District, is reported at 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 (1987).

SUMMARY OF ARGUMENT

In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court accepted the California Supreme Court's interpretation of the California Constitution to allow intrusion onto the private property of a shopping mall for political petitioning or leafleting as long as the property owner could impose reasonable restrictions on the activity.

In the case at bar, however, the California Court of Appeal struck down the shopping center's reasonable regulations on their face because they did not meet the "content-neutral, least restrictive means" test traditionally reserved for measuring state action restricting speech in quintessential public forums. In thus applying the wrong constitutional standard, equating property owners with governmental entities, the court drastically extended *Pruneyard* and violated the property owners' First, Fifth and Fourteenth Amendment rights. Property owners are now forced to subsidize all ideological activities regardless of their own interests and beliefs. Moreover, the court has taken the property owners' right to reasonably exclude from their property those who seek to use it not for the purpose for which the owner has invited the public but to advance their own ideological agenda.

ARGUMENT

I

BY EQUATING A PRIVATE PROPERTY OWNER WITH A GOVERNMENTAL ENTITY, THE CALIFORNIA COURT VIOLATES THE PROPERTY OWNER'S FIRST AMENDMENT RIGHTS

In striking down the property owner's regulations, the court below held that one regulation was "fatally flawed" because it allowed the shopping center owner discretion to decide whether the intrusive political activity would "adversely affect the shopping center environment, atmosphere or image." It stated that such a regulation was not reasonable because it was not content-neutral and did not provide "definite, objective guidelines" as to how that discretion was to be exercised. *H-CHH Associates v. Citizens for Representative Government*, 193 Cal. App. 3d at 1211. Importantly, however, as applied to these respondents, the court recognized that the regulations were applied reasonably. The court below *upheld* the shopping center's original refusal to allow political petitioning during the Christmas holiday. 193 Cal. App. 3d at 1220. Moreover, the property owners thereafter granted respondents permission to petition at the shopping center on January 2. 193 Cal. App. 3d at 1204.

The court nonetheless struck down the property owner's regulations *on their face*, erroneously measuring the regulations by a standard traditionally reserved for state action and "quintessential public forums." See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). The court below stated:

“[L]ike any other time, place and manner regulations, those of a shopping center are constitutionally reasonable only if they are narrowly drawn and limited to the end of promoting specifically identified substantial interests.

“. . . [I]t is clear the constitutionality of plaintiffs' regulations must be assessed by 'a balancing of interest and a determination that [the party] has used the "least restrictive means" to regulate the conduct in question.' ” 193 Cal. App. 3d at 1208-09.

Even cases involving *public* properties that are not traditional public forums are subject to a lower standard of review (the reasonable regulation standard) than the court applied here. *Perry*, 460 U.S. at 46.

The court below thus applied an erroneous constitutional analysis to the regulations in this case. A private property owner is not a governmental entity. Unlike the government, a private person need not subsidize, and cannot be compelled to donate his property to ideological activity. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977). He is entitled under the First Amendment to support and oppose, publicly or privately, ideological activities of *any* sort. He may refrain from supporting causes and activities for any reason, be it because he is morally opposed or because he reasonably believes the activities imperil the uses and purposes for which he has invited the public onto his property.

In treating the shopping center owner like a governmental entity, the California court has elevated the state free speech interests of soapbox orators above the First Amendment interests of the private property owner. By

preventing a private property owner from adopting regulations on political or ideological activity unless they are "content-neutral" and "narrowly" tailored to serve a significant interest," the California court now requires the private property owner to subsidize any and all political, religious, or social action groups by furnishing a convenient place for them to urge their views on the public. This new standard imposed upon private property owners prevents the owner from electing not to subsidize the particular ideological views of any one group. *Pruneyard* does not support this infringement.

The court's converting of the *Pruneyard* "reasonable regulation" standard into the strictest "content-neutral, least restrictive means" standard is erroneous. *Pruneyard* established the "reasonable regulation" standard as a small safeguard to protect what vestige of the property owner's rights remained intact after allowing political activity to override the property owner's rights: "A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, *under reasonable regulations adopted by defendant* to assure that these activities do not interfere with normal business operations [citation omitted] would not markedly dilute defendant's property rights." *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 911, 153 Cal. Rptr. 854 (1979) (emphasis added).

On appeal, this Court recognized the importance of the "reasonable regulation" safeguard for the property owner's rights. Justice Rehnquist quoted this very language in his majority opinion. *Pruneyard*, 447 U.S. at 78.

Justice Marshall, concurring, also noted specifically that the "owners are permitted to impose reasonable restrictions on expressive activity." 447 U.S. at 94. Justice White, concurring in part and concurring in the judgment, relied on the fact that "[t]he state court recognized, however, that reasonable time and place limitations could be imposed...." 447 U.S. at 95.

To place the private property owner on the same footing as government and require him to supply a forum for *all* causes without regard to those he reasonably may find objectionable, either for personal, moral, or business reasons, unconstitutionally compels him to subsidize an ideological cause. *Abood, supra*. Amicus urges the Court to grant certiorari in this case to restore the private property owner's First Amendment rights to a status equal to the rights of those who seek to use his property for their own ideological purposes.

II

PREVENTING THE PROPERTY OWNER FROM IMPOSING REASONABLE RESTRICTIONS ON FREE SPEECH ACTIVITIES IS A TAKING OF HIS RIGHT TO EXCLUDE WITHOUT JUST COMPENSATION

The state, by *ipse dixit*, may not redefine property rights so as to transform private property into public property without compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). By converting this Court's requirement of "reasonable regulations" into the "neutral, objective, narrowly-drawn, and least restrictive" standard, the California court has done just that. It has robbed the owner of his remaining right

to exclude persons from his property whom he subjectively (and reasonably) believes will disrupt his own and his invitees' use of his property. Whereas *Pruneyard* allowed the owner the reasonable right to exclude, the new standard requires the owner to allow *all* speakers onto his property regardless of their purpose and cause. This conversion of private property into a wide open public forum is a significant interference with the owner's reasonable investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The new standard expressed by the Court of Appeal allows the property invasion to occur at the will of the speaker. Ideological advocacy now must be allowed on an almost permanent and continuous basis. The court did not even allow the property owner to regulate *where* on the private property the political activity would occur. 193 Cal. App. 3d at 1213. The degree of entry and use that the court condones is tantamount to a "permanent physical occupation." *Nollan v. California Coastal Commission*, — U.S. —, 97 L. Ed. 2d 677, 686 (1987). Unless private property owners are allowed reasonable latitude to protect their interests by restricting the entry and use of their property by others, the regular and repeated invasion of the ideological activities approaches the type of occupation that is a taking *per se* and is invalid under the Fifth and Fourteenth Amendments "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

Amicus urges the Court to grant certiorari to redress the violation of this important constitutional right.

CONCLUSION

Private regulations, overtly reasonable to protect the use of the property for its designated purpose, and clearly justified to protect the rights of the owners and their tenants, have been struck down on their face because they did not meet the "content-neutral, least restrictive means" test reserved for state action restricting speech on public sidewalks. Consequently, the private property owner is now required to donate his property to all political and ideological activities without concern for his own or his tenants' interests and rights. This transformation of private property into a wide open public forum violates the property owner's First, Fifth, and Fourteenth Amendment rights and elevates the speakers' state constitutional rights above those federal constitutional rights of the property owner in violation of the Supremacy Clause. Amicus respectfully urges this Court to grant certiorari to restore the property owners' constitutional rights.

DATED: February, 1988.

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